**U.S. Department of Labor**

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

**Issue Date: 05 June 2007**

**CASE NO.: 2004-DBA-00005**

In the Matter of:

Disputes concerning the payment
of prevailing wage rates and
proper classification by:

**EMRG, INC.,**
General Contractor

and

**EAST COAST PLUMBING AND HEATING, INC.,**
Subcontractor

With respect to laborers and mechanics
employed by the contractor under contracts
02-EE-058 for PINE OAKS VILLAGE III,
Harwich; and for work on the (no contract
number) BROCKTON FAMILY LIFE CENTER,
Brockton.

*Appearances*:

Paul J. Katz, Senior Trial Attorney (Jonathan L. Snare, Acting Solicitor of Labor; Frank V. McDermott, Jr., Regional Solicitor), Boston, Massachusetts, for the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor

Lawrence K. Richmond, Quincy, Massachusetts,
for the Respondent Subcontractor

*Before*: Daniel F. Sutton, Administrative Law Judge

## DECISION AND ORDER

## I. Statement of the Case

This proceeding arises under the labor standards and prevailing wage provisions of the Davis-Bacon Act (the "DBA"), 40 U.S.C. § 276a *et seq*., which requires that workers on Government construction projects be paid not less than the minimum wages determined by the Secretary of Labor to be prevailing for corresponding work on similar projects in the area. Congress passed the DBA to protect workers from substandard earnings by fixing a floor under wages on Government projects. *United States v. Binghamton Construction Co*., 347 U.S. 171, 177, *rehearing denied*, 347 U.S. 940 (1954). The Secretary has issued regulations at 29 C.F.R. Parts 5 and 6 which implement the labor standards and prevailing wage provisions of the DBA and several related statutes.

In this case, EMRG, Inc. ("EMRG"), the general contractor, entered into contracts with the Department of Housing and Urban Development ("HUD") to perform work on HUD-financed projects in Massachusetts. EMRG, in turn, entered into a contract with East Coast Plumbing and Heating, Inc. ("East Coast"), a subcontractor, to perform some of the work under its contracts with HUD. During the performance of these contracts, the Department of Labor conducted an investigation and determined that East Coast failed to pay the applicable prevailing wage rate to one employee ("J. H.") and erroneously listed two other employees ("C. B." and "C. F.") as apprentices, thereby improperly paying them at an apprentice wage rate. Consequently, the Department of Labor suspended payments under the contract to cover the claimed back wages pursuant to 29 C.F.R. § 5.9. EMRG and East Coast both requested a hearing, and the matter was referred to the Office of Administrative Law Judges pursuant to pursuant to 29 C.F.R. § 5.11(b). The hearing requests were separately docketed as Case No. 2004-DBA-5 (the East Coast Hearing request) and 2005-DBA-10 (the EMRG request).

In addition to the labor standards and prevailing wage issues, a dispute arose between EMRG and East Coast over the latter's performance of its subcontract, resulting in litigation between the two firms that is currently pending in state court. East Coast also filed a negligence claim in state court against one of the allegedly underpaid employees, claiming that he was a *bona fide* subcontractor on the HUD projects.

EMRG and the Department of Labor agreed to resolve the labor standards and prevailing wage issues in Case No. 2005-DBA-10 by means of consent findings which were approved in a decision and order issued pursuant to 29 C.F.R. § 6.18 on January 11, 2006. The consent findings provided for the release of $23,000.00 in suspended contract payments to the Department of Labor for payment to the allegedly underpaid workers. EMRG, Inc., Case No. 2005-DBA-10 (Dec. & Ord. Approving Consent Findings Jan. 11, 2006), slip op. at 2.

East Coast and the Department of Labor subsequently submitted Partial Consent Findings and Stipulations of Fact with the intention of resolving all issues with the sole exception of whether East Coast violated the prevailing wage rate provisions of the DBA with regard to J. H. and, if so, the amount of back wages due. The Partial Consent Findings stipulated that Respondent would make a payment of $12,158.90 in settlement of wage claims made by the Secretary on behalf of the other two employees, to be made from the amounts

withheld by the Regional Administrator. Thereafter, the parties attempted to resolve the remaining issues with respect to J. H. and by letter dated June 30, 2006, they filed a Notice of Proposed Settlement. However, EMRG submitted a Limited Opposition to the Proposed Settlement and by order issued on September 14, 2006, I sustained EMRG's objection and disapproved the proposed settlement after finding that it contained a provision that would require the continued withholding of funds without a basis in law and that it did not contain a provision allowing for the severance of any unacceptable provisions.

Following the disapproval of the settlement, the case proceeded to a formal hearing on November 9, 2006 at which time the Secretary and East Coast both appeared, and introduced evidence and argument. At the hearing, East Coast requested to withdraw from one of the stipulations, and its request was taken under advisement. Hearing Transcript ("TR") at 12-13. The Secretary advised in her post-hearing memorandum that she does not challenge the withdrawal which is hereby allowed. Sec'y Mem. at 2. After the hearing, the parties offered the following evidence: (1) East Coast's Appellate Brief and Appendix from the state court action against J. H.; and (2) the December 19, 2006 Affidavit of Compliance Officer Carl Loria. The Secretary also filed, with East Coast's assent, exhibits which are referenced in the parties' previously submitted Partial Consent Findings and Stipulations of Fact. The Affidavit is admitted without objection as Secretary's Exhibit ("SX") 1. The Secretary's relevance objection to East Coast's appellate brief and appendix is overruled, and these documents are admitted as Respondent's Exhibit ("RX") 1. Leave for filing briefs was granted by order issued on January 3, 2007, and a post-hearing memorandum was received from the Secretary. The record is now closed.

After careful consideration of the record and the parties' arguments, I find that East Coast did, as alleged by the Secretary, fail to comply with the labor standards and prevailing wage requirements of the DBA. Consequently, I conclude that East Coast is liable for back pay to the three affected workers as set forth below in this decision.

## II. Findings of Fact and Conclusions of Law

A. The Parties' Stipulations of Fact

The parties filed stipulations of fact which are set forth below and which I have reviewed and hereby adopt as my findings.[1] The stipulations, which are in the record as Administrative Law Judge Exhibit ("ALJX") 9, have been renumbered since the original paragraph 7 in the stipulation was struck by the parties and since East Coast has been allowed to withdraw from stipulation paragraph 15.

(1) Respondent, East Coast Plumbing and Heating, Inc. is a Massachusetts corporation.

(2) Respondent, as a subcontractor for EMRG Inc., performed work under contracts 023-EE-058 for Pine Oaks Village III, Harwich, Massachusetts and (no contract number)

[1] The names of workers in the parties Stipulations of Fact and Partial Consent Findings have been redacted and replaced with initials.

Brockton Family Life Center, Brockton, Massachusetts in the period approximately (week ending dates) December 22, 2001 to November 16, 2002.

(3) The Pine Oaks Village Project involved the construction of low income elderly housing. The project was funded by the U.S. Department of Housing and Urban Development, Sec. 202 of the Housing Act of 1959. The Applicable Wage Determination is MA 010019, Modification No. 2, dated August 10, 2001, a copy of which has been submitted as Exhibit 1.

(4) The Brockton Family Life Center Project was funded in part by the U.S. Department of Housing and Urban Development (HUD). The Applicable Wage Determination is MA 020019, Modification No. 3, dated April 5, 2002, a copy of which has been submitted as Exhibit 2.

(5) The Respondent is a covered employer under the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act [40 U.S.C. § 327 *et seq*.] providing work on the two contracts referenced above.

(6) The court has jurisdiction to adjudicate prevailing rate and overtime issues over Respondent with regard to the two projects in question.

(7) The prevailing rate for plumbers on the two projects herein was $24.55/hr plus $11.07/hr for pension and health benefits.

(8) Respondent's certified payrolls for the period in question, for the three employees involved herein, have been submitted as Exhibit 3.

(9) Respondent properly characterized and paid certain other employees as apprentices.

(10) The Respondent paid C. B. and C. F. as apprentices (at the rate of $12.23 per hour plus $11.07 per hour for pension and health benefits) on the two projects in question.

(11) C. B. and C. F. were licensed as plumbers by the Commonwealth of Massachusetts at the time they performed work on the two projects herein.

(12) C. B. and C. F. were not registered with the U.S. Department of Labor's Bureau of Apprenticeship and Training Program at the time they performed work on the two projects herein.

(13) The hours of work of C. B. and C. F. as set forth in Respondent's certified payrolls (Exhibit 3) are correct.

(14) The hours of work of J. H. as set forth at the Respondent's Certified Payroll (Exhibit 3) are correct, and if the Court finds that he was improperly paid under the DBRA and CWHSSA on the two contracts herein, the back wages due him is $8,293.80.

(15) Respondent contends as to J. H., that he (a) was an independent contractor and not an employee and as such, was not a covered employee under the DBRA and CWHSSA for work performed under the two contracts herein and (b) that Respondent paid J. H. at an agreed upon rate of $30/hr plus (i) inclusion into Respondent's Workers Compensation Program, (ii) free use of telephone, (iii) use of Respondent's tools and equipment while working on the two contracts in question, and (iv) the ability to charge material to Respondent's account (and thereby benefit from Respondent's better rates). Plaintiff disputes the factual assertions of Respondent on this issue and, further, argues that even if J. H. is found to be an "independent contractor," such is not a bar to his being covered under the DBRA and CHWSSA in general and under the two contracts in question in particular.

(16) J. H. worked on three of Respondent's projects for one full year, approximately 40 hours per week, on these projects.

(17) Nothing in this Stipulation of Fact shall preclude either party from adducing evidence on any issue herein at trial.

B. Partial Consent Findings

The parties have also filed partial consent findings (ALJX 9) set forth below which I hereby approve and adopt as my findings.

(1) There is now pending before the Office of Administrative Law Judges, U.S. Department of Labor, a proceeding under 29 CFR §§5.11(b) and 5.12 to determine disputes concerning payment of wages.

(2) It is the desire of the Secretary and Respondent to partially dispense with such proceeding and to limit the issues for hearing in this matter to the sole issue of whether the Respondent violated the prevailing wage provisions of the Davis-Bacon Act with regard to one employee, J. H., by payment by the Respondent of $12,158.90 in settlement of wage claims made by the Secretary on behalf of two employees (C. B. and C. F.) who worked on the aforesaid projects. The employees and wage amounts are set forth in Exhibit 1, attached hereto. Payment shall be made from amounts presently withheld by a Regional Administrator, Employment Standards Administration, U.S. Department of Labor, Boston, Massachusetts. The Regional Administrator shall distribute the back wages to the employees listed above or their estates if necessary and any such which within three years from the date of this agreement have not been distributed to the employees, or their personal representatives, because of the inability to locate the proper persons or because of such person's refusal to accept such sum, shall be deposited with the Treasurer of the United States.

(3) The Respondent specifically retains the right to be heard on the issue of whether it violated the prevailing rate provisions of the DBRA with regard to one employee, J. H.

(4) This settlement is intended by the Secretary and the Respondent to be a final resolution of all aspects of this matter with the exception of those particularly stated at part (3), supra and each party in connection with any stage of this proceeding.

(6) The Secretary and Respondent further agree that:

(a) Any order entered in accordance with these partial consent findings shall, pursuant to 29 C.F.R. Part 6, have the same force and effect as an Order made after full hearings.

(b) The entire record upon which any final order may be based shall, pursuant to 29 C.F.R. Part 6, consist of the Complaint and this agreement.

(c) Any Order herein concerning debarment under the Davis Bacon Act shall await a full hearing in this matter,

(d) All further procedural rights provide by 29 C.F.R. Part 6 and any rights to contest the validity of this partial agreement at any Order issued pursuant thereto are hereby waived, except as particularly set forth herein above.

C. Findings and Conclusions on Disputed Issues

The basic facts surrounding J. H.'s work for East Coast and his wages are not disputed. East Coast's President of Operations hired J. H. in October of 2001 after he responded to a newspaper advertisement for a licensed plumber to work on the Pine Oaks contract for which East Coast was a subcontractor to EMRG. TR 26, 63. The prevailing wage rate for plumbers in that county was $35.52 per hour ($24.45 and fringe benefits of $11.07 per hour). ALJX 9, Stipulation of Facts at ¶ 8; TR 27. J. H. did plumbing work for East Coast in kitchens and bathrooms and on heating systems and boilers. TR 43. East Coast did not pay J. H. at the prevailing rate of $35.52 per hour for his work but instead paid him at an hourly rate of $30.00 which was based on deductions for workers' compensation insurance, use of a telephone for personal purposes and use of East Coast's tools. *Id.* at 28-30; 56-59.[2] J. H. worked for East Coast until October of 2002 when he was laid off. TR 35. The Secretary's investigator testified that East Coast's bookkeeping records showed that J. H. was paid $30.00 per hour, although there was a separate payroll record that listed the prevailing wage rate of $35.52 per hour. *Id*. at 73-74. The difference between the wages actually paid to J. H. and what he would have been paid at the prevailing rate is $8,293.80. ALJX 9, Stipulation of Facts at ¶ 16. After J. H. was laid off, East Coast brought a civil action against him in Massachusetts Superior Court, alleging, *inter alia*, that J. H. negligently installed tubing which later leaked and caused $85,000.00 in damage. EX 1. In a decision issued on August 25, 2004, the Superior Court (Connor, J.) found that J. H. was an independent contractor to East Coast under Massachusetts law, and not an employee, but it otherwise ruled against East Coast on all counts. *Id.*

As the Secretary has correctly asserted throughout his litigation, whether J.H. was an independent contractor or an employee is irrelevant because the DBA requires payment of

[2] East Coast's President characterized the process of arriving at the $30.00 hourly rate as a negotiation. TR 28-30. J. H. agreed that he accepted East Coast's offer of $30.00 per hour, but he denied that there was any negotiation. *Id.* at 56-59. For reasons discussed below, this dispute and a related dispute over J. H.'s motivation for accepting the $30.00 per hour offer are irrelevant to the issues raised in this proceeding.

prevailing wages to "laborers and mechanics" and makes no mention of employees. 40 U.S.C. § 276a. The Secretary's regulations define a laborer or mechanic as including "at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial." 29 C.F.R. 5.2(m).[3] Thus, the "lack of a traditional employee/employer relationship" is no defense to a contractor's liability to pay prevailing wages so long as the workers involved are laborers or mechanics. *Star Brite Construction Co., Inc*., USDOL/OALJ Reporter (HTML) ARB No. 98-113, ALJ No. 1997-DBA-12 (ARB June 30, 2000) at 6. The Claimant's uncontradicted testimony establishes that his plumbing work for East Coast was manual or physical in nature, and East Coast has made no argument that he falls within any exception to the applicable definition of a laborer or mechanic. Moreover, the Secretary's investigator testified that he determined that J. H. was a laborer or mechanic for DBA purposes based on the nature of his work for East Coast. TR 72-73. Again, East Coast has offered no contrary evidence. Therefore, I find and conclude that since J. H. worked as a laborer or mechanic on the Federal construction projects where East Coast was a subcontractor, East Coast was required to pay him the applicable plumber's wage rate of $35.52 per hour for all hours that he worked on the projects. The fact that J. H. may have agreed to accept a substandard pay rate is also legally irrelevant because workers' statutory rights to Federal wage and labor standards protections cannot be waived or otherwise bargained away. *See Hugo Reforestation, Inc*., USDOL/OALJ Reporter (HTML) ARB No. 99-003, ALJ No. 1997-SCA-20 (ARB Apr. 30, 2001) at 6. *See also Fleming v. Warshawsky*, 123 F.2d 622, 626 (7th Cir. 1941); *United States v. Morley Constr*., 98 F.2d 781, 789 (2d Cir. 1938); *In re Abhe & Svoboda, Inc.,* USDOL/OALJ Reporter (HTML) ARB Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Nos. 1999-DBA-20 to 27 (ARB July 30, 2004) at 15, *recon. denied,* (ARB October 15, 2004). As it is undisputed that East Coast failed to pay J. H. at the applicable prevailing rate for a plumber in the locale where the project work was performed, I conclude that East Coast violated the DBA and is liable for back pay in the amount of $8,293.80 which shall be paid to J. H. from withheld funds.

## III Order

(1) The Regional Administrator, Employment Standards Administration, U.S. Department of Labor, Boston, Massachusetts shall distribute from withheld contract funds the following amounts as back pay: $8,293.80 to J. H.; $4,140.36 to C. B.; and $8,028.54 to C.F.

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[3] The full regulatory definition of laborer or mechanic is:

> The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.

29 C.F.R. § 5.2(m).

(2) Any sums for payment to an identified employee, which are not paid to said employee or his legal representative within a reasonable time not to exceed one year from this Decision and Order because of inability, after reasonable diligence, to locate the employee or his legal representative, shall be deposited in the Treasury of the United States.

**SO ORDERED**.

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**DANIEL F. SUTTON**
Administrative Law Judge

Boston, Massachusetts

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within forty (40) days of the date of issuance of the administrative law judge's decision. 29 C.F.R. § 6.34. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. The Petition must refer to the specific findings of fact, conclusion of law, or order at issue. *See* 29 C.F.R. § 6.34. Once an appeal is filed, all inquires and correspondence should be directed to the Board.

When a Petition is timely filed with the Board, the administrative law judge's decision is inoperative until the Board either (1) declines to review the administrative law judge's decision, or (2) issues an order affirming the decision. *See* 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. *See* 29 C.F.R. § 6.34.